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tion of the provisions of the Act. Any other conclusion would leave the words without meaning unless the second sub-section were regarded as merely evidentiary. But it is clearly more than evidentiary because, independently of any other provision, it directly constitutes a new substantive offence and affixes the penalty. The decision of the Court of Petty Sessions was therefore right and should be restored.

Appeal allowed. Order appealed from discharged. Order nisi discharged with costs.

Solicitor, for appellant, *Guinness*, Crown Solicitor for Victoria.
Solicitors, for respondent, *White, Just & Moore.*

B. L.

[HIGH COURT OF AUSTRALIA.]

SWEENEY . . . . . APPELLANT;

AND

KELLY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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SYDNEY, *August* 28.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Practice—Special leave—Appeal from Supreme Court—Refusal to quash conviction on technical point—Matter of discretion—Licensing Act 1885 (*Qd.*) (49 *Vict. No.* 18), *sec.* 75 (2)—*Liquor Act* 1886 (*Qd.*) (50 *Vict. No.* 30), *sec.* 25—*Notice of intention to prosecute—Evidence.*

The licensee of an hotel was convicted and fined for an offence against the *Licensing Act* 1885. Sec. 25 of the *Liquor Act* 1886, requires that written

notice of intention to prosecute must be given to the accused, specifying the section of the Act under which the prosecution is intended to be instituted. The prosecutor had given written notice of intention to prosecute but the notice was not produced, and no evidence was given as to its contents. An application to quash the conviction on the ground that due proof of the notice had not been given was refused by the Supreme Court.

On an application to the High Court for special leave to appeal from this decision :

Held, that the grant or refusal of an order to quash a conviction on a purely technical point was in the discretion of the Supreme Court, and that, as this was a case in which they might properly have exercised their discretion by refusing the order, whether the reasons given by the Supreme Court for their refusal were sufficient or not, special leave to appeal should not be granted.

Special leave to appeal from the decision of the Supreme Court, (*Kelly* v. *Sweeney* ; *Ex parte Sweeney*, 1908 St. R. Qd., 182), refused.

MOTION for special leave to appeal from a decision of the Supreme Court of Queensland.

The applicant, Ellen Sweeney, the licensee of a hotel at Dalby, in Queensland, was prosecuted before a Police Magistrate for keeping her licensed premises open for the sale of liquor on a Sunday, which is an offence against sec. 75 (2) of the *Licensing Act* 49 Vict. No. 18. The prosecutor, a police-constable, stated in his evidence that within 14 days of the alleged offence he served a notice of the intended prosecution upon the licensee personally at her hotel, and at the same time explained the nature of the notice to her, and on the following day laid an information against her and served the summons. The notice was not produced and no further evidence was given as to its contents. The defendant was convicted and fined. She then obtained a rule *nisi* for a quashing order from *Real* J. on the ground that there was no proper proof of the service of a notice or that the notice complied with the provisions of sec. 25 of the *Liquor Act* 1886.

The Full Court (consisting of *Cooper* CJ., *Real* J. and *Power* J.) discharged the rule *nisi* by a majority, *Real* J. dissenting : *Kelly* v. *Sweeney* ; *Ex parte Sweeney* (1). On the question of costs, the notice was produced annexed to an affidavit and appeared to be in the proper form.

(1) 1908 St. R. Qd., 182.

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The defendant now moved for special leave to appeal from the decision of the Full Court.

Walsh (of the Queensland Bar), for the appellant. There was no evidence of the contents of the notice, and consequently there was no proof that sec. 25 of the *Liquor Act* 1886 had been complied with. *Cooper* C.J. based his decision on the ground that judicial notice could be taken of the contents of the notice (1). and *Power* J. thought that there was sufficient evidence of the nature of the notice (2).

[GRIFFITH C.J.—What question of general public interest is involved?]

It is of importance to the licensee herself because the conviction affects her right to a renewal, and it is of general importance because the decision involves an important departure from the general rules of evidence, which, if followed, would seriously affect the practice in prosecutions.

[GRIFFITH C.J.—It was in the discretion of the Court whether they would quash the conviction or not under the circumstances: *Irving* v. *Gagliardi* (3). They might have refused to quash it because the point was purely technical and there were no merits.]

Proof of service was a condition precedent to a conviction. The point is similar to that involved in *Walsh v. Doherty* (4).

[GRIFFITH C.J.—There is an appeal to the District Court in these cases. There the merits would be inquired into. Under these circumstances the Supreme Court would not readily allow a person to take advantage of a purely technical point. And you must show still stronger reasons in this Court for special leave.]

The licensee was entitled to rely on the point and abstain from going into the merits. She may have had a good defence. The Court should not presume that she had no merits from the mere fact that she gave no evidence. No merits were shown in *Walsh* v. *Doherty* (4). The grounds of the Supreme Court's decision involve points of great importance.

[GRIFFITH C.J.—The reasons are important, but not the judgment. We do not grant special leave to appeal from the

(1) 1908 St. R. Qd., 182, at p. 187.
(2) 1908 St. R. Qd., 182, at p. 189.
(3) 6 Q.L.J., 155.
(4) 5 C.L.R., 196.

reasons. The only question was as to a mistake made by a particular constable in proving his case. In *Walsh* v. *Doherty* (1) the defect was incurable.

ISAACS J.—You are practically asking the Court to order a fresh proceeding in which you are bound to fail.]

The decision is also important on the question of onus of proof.

GRIFFITH C.J. It is clear that this is not a case for granting special leave to appeal. There is no point of law of general interest involved, and it is admitted that there are no merits. The only point involved is this: that the reasons given by one of the learned Judges in the Court below, if accepted as good law, might cause difficulties in the administration of justice. As he is reported in the copy of the judgment supplied to us, it appears that the learned Chief Justice was of opinion that it was not necessary for the prosecution to prove that notice had been given as required by sec. 25 of the *Liquor Act* 1886. The case of *Walsh* v. *Doherty* (1), which was recently decided by this Court, involved the question of the necessity not only of giving notice, but of proving the notice as a condition precedent to the prosecution, and I think that, if that had been brought to the attention of the learned Chief Justice, he would probably have taken that view. But it does not follow that in this case the conviction ought to have been quashed. It was laid down in the Supreme Court of New South Wales a very long time ago, in *Ex parte Heggarty* (2), and other cases, that the grant or refusal of a statutory prohibition (it is still called a prohibition in New South Wales) was discretionary and that the Court is not bound to quash a conviction upon a purely technical point. The same rule was laid down in Queensland in *Irving* v. *Gagliardi* (3). Under the circumstances of this case I think that the Supreme Court might properly have exercised their discretion in discharging the quashing order, entirely apart from the question whether the evidence of service was sufficient or not. That is a matter which was open to a good deal of discussion. We are told that *Power* J. took

(1) 5 C.L.R., 196.
(2) 3 S.C.R. (N.S.W.), 212.
(3) 6 Q.L.J., 155.

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the view that the Court was justified on the evidence and course of proceedings before the magistrate in inferring that proper notice was given. In any view there is no ground for granting special leave to appeal.

BARTON J., O'CONNOR J., and ISAACS J. concurred.

Special leave refused.

Solicitor, for applicant, *A. H. Pace*, for *W. J. Vowles*, Dalby, Queensland.

C. A. W.

[HIGH COURT OF AUSTRALIA.]

THE WHEAL ELLEN GOLD MINING COMPANY, NO LIABILITY . . } PLAINTIFFS;

AND

READ . . . . . DEFENDANT.

H. C. OF A. 1908.

MELBOURNE, *Sept.* 4, 5, 7, 18.

HIGGINS J.

Company—Promoter, who is—Secret profits—Amount recoverable.

One who brings a company into existence by taking an active part in forming it or in procuring persons to join it as soon as it is technically formed is a promoter of the company.

In an action by a mining company against the defendant to recover the profit made by him as a promoter of the company, which profit had not been disclosed to the directors or to the shareholders,

Held that, on the evidence, the defendant was a promoter, and that the company was entitled to recover from him his net gain from the transaction as a whole, including the value when issued of shares in the company issued to him which had become worthless, but not including money paid, and shares issued, to him, and paid and transferred by him to others for services rendered him in the formation of the company.